INTERIOR BOARD OF INDIAN APPEALS

Toyon Wintu Center, Inc. v. Sacramento Area Director, Bureau of Indian Affairs

29 IBIA 290 (08/26/1996)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

TOYON WINTU CENTER, INC., Appellant	:	Order Dismissing Appeal
v.	:	
	:	Docket No. IBIA 96-72-A
SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	August 26, 1996

Appellant Toyon Wintu Center, Inc., seeks a decision on the merits of its claim for compensation for the loss of a building. 1/ Appellant bases its claim on a settlement agreement entered into in Toyon Wintu Center, Inc. v. United States Department of the Interior, Civil No. S-85-1144-MLS and Civil No. S-85-1322 MLS (Related Case)(E.D. Calif. Apr. 20, 1987). For the reasons discussed below, the Board of Indian Appeals (Board) dismisses this appeal because it lacks authority to grant the relief requested.

Because of the posture of this case, as described below, the Board does not have the full administrative record in this matter before it. The only materials before the Board are the submissions of the parties.

At page 2 of its Statement of Reasons, appellant presents the following version of the background of this matter:

> The Agreement settled years of litigation concerning the use and occupancy by the Wintu people, and others, of [an administration building at the Toyon Wintu Center]. Under the Agreement, [appellant] was promised use of the Administration Building to conduct tribal business, and, in particular, to pursue formal BIA recognition and acknowledgment.

1/ Appellant is represented in this matter by Robert Golten, Supervising Attorney, and David E. Johnson, who is described as a "Student Attorney," of the Indian Law Clinic of the University of Colorado School of Law. The regulations governing practice before the Department of the Interior, 43 CFR Part 1, do not authorize appearances by "student attorneys."

Because appellant's notice of appeal was signed by both Mr. Golten and Mr. Johnson, the Board did not question representation. However, all subsequent filings were signed only by Mr. Johnson. Mr. Golten's signature was affixed by another individual. Not being expert in handwriting analysis, the Board was unable to determine whether the initials next to Mr. Golten's signature were written by Mr. Johnson, although it appears that the actual signature and the initials were written by different hands.

For purposes of this decision, the Board assumes that Mr. Johnson's work actually was supervised by Mr. Golten. Mr. Golten is considered the attorney of record.

> Pursuant to the Agreement, the BIA contracted with an independent contractor for cleanup work in the Administration building before [appellant] was to enter and begin rehabilitation of the building. On or about May 4-5, 1990, before [appellant] assumed occupancy, the Administration building was destroyed in a fire.
>
> [Appellant] asked the BIA numerous times to fulfill its obligations under the Agreement by either replacing the Administration Building, or by rehabilitating a second building * * * for [appellant's] use. The initial requests to the BIA were made on an informal basis. However, when these proved unsuccessful, [appellant] formally sought relief under 25 C.F.R. § 2.1 et seq.

Although no copy of the letter appears in the materials before the Board, the filings of the parties indicate that on September 30, 1994, appellant wrote to the Superintendent, Northern California Agency, BIA (Superintendent), contending that BIA was negligent in regard to the fire and that appellant was entitled to the use of a building under the settlement agreement. Based on these allegations, appellant apparently requested compensation for the building.

On March 22, 1995, appellant wrote to both the Superintendent and the Department's Deputy Regional Solicitor, Pacific Southwest Region (Solicitor's Office). In the letter to the Superintendent, appellant asked that BIA replace the building. Appellant further stated that because it had not received a response to its September 30, 1994, letter, it was proceeding under 25 CFR 2.8. 2/

2/ Section 2.8 provides:

"(a) A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, can make the official's inaction the subject of appeal, as follows:

"(1) Request in writing that the official take the action originally asked of him/her;

"(2) Describe the interest adversely affected by the official's inaction, including a description of the loss, impairment or impediment of such interest caused by the official's inaction;

"(3) State that, unless the official involved either takes action on the merits of the written request within 10 days of receipt of such request by the official, or establishes a date by which action will be taken, an appeal shall be filed in accordance with this part.

"(b) The official receiving a request as specified in paragraph (a) of this section must either make a decision on the merits of the initial request within 10 days from receipt of the request for a decision or establish a reasonable later date by which the decision shall be Trade, not to exceed 60 days from the date of request. If an official establishes a date by which a requested decision shall be made, this date shall be the date by which failure to make a decision shall be appealable under this part. If the official, within the 10-day period specified in paragraph (a) of this section, neither makes a decision on the merits of the initial request nor establishes a later date by which a decision shall be made, the official's

With its March 22, 1995, letter to the Solicitor's Office, appellant enclosed a draft complaint which it indicated it was prepared to file in the United States Court of Federal Claims. Although clearly alleging that BIA was negligent in regard to the fire, the draft complaint stated that it was filed under the Tucker Act, 28 U.S.C. § 1491 (1994), for breach of contract.

The Solicitor's Office responded by letter dated May 11, 1995. The letter stated the opinion that the draft complaint "alleged a negligent act rather than breach of contract, and you have failed to properly or timely file a tort claim with" BIA (Letter at unnumbered 2). Substantively, the Solicitor's Office disagreed with appellant's allegation that BIA had been negligent and contended that the settlement agreement did not require BIA to preserve and maintain the building.

The Superintendent apparently did not respond to appellant's March 22, 1995, letter. On August 10, 1995, appellant filed a notice of appeal with the Area Director under 25 CFR 2.8.

Appellant apparently also again wrote to the Superintendent. Referencing an August 31, 1995, letter from appellant, on October 4, 1995, the Superintendent denied the appeal on the grounds that the matter was a tort claim which was not appropriately pursued under the regulations in 25 CFR Part 2; appellant lacked standing because it had failed to state an adverse BIA action which it was appealing; BIA did not hold the land in question in trust status, nor did it have a trust relationship with appellant; and the appeal was not timely. Appellant appealed this decision to the Area Director on November 7, 1995.

By letter dated October 25, 1995, the Area Director dismissed appellant's August 10, 1995, appeal to him on the grounds that it was untimely. The decision states:

> [Appellant's] September 30, 1994, letter was received at the Northern California Agency on October 11, 1994. Thus, the 10 day deadline within which the Superintendent could have made a decision would be October 21, 1994. After this date, the Superintendent's inaction became appealable to the Area Director within the time specified under 25 CFR Part 2.9. There is no record indicating that the Superintendent made a decision within the 10-day period nor did he notify [appellant] that he would make a decision at a later date within 60 days. Therefore, the 30 day period for filing an appeal commenced on October 22, 1995 [sic, should be 1994] and ended on November 21, 1954.
>
> Both agency and area office records show that no appeal was filed within the 30-day period; therefore, your appeal is dismissed pursuant to 25 CFR 2.17(a).

In a second letter dated November 7, 1995, appellant wrote to the Area Director, objecting to this dismissal.

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fn. 2 (continued)
inaction shall be appealable to the next official in the process established in this part."

On March 25, 1996, appellant wrote two letters to the Area Director. One letter concerned appellant's November 7, 1995, appeal from the Superintendent's October 4, 1995, decision. The second letter stated it was about appellant's November 7, 1995, "appeal" of the Area Director's October 25, 1995, decision. Both letters indicated that if appellant did not receive a response, it would file an appeal with the Board.

Appellant apparently received no response, because it appealed to the Board by letter dated May 16, 1996. In a May 23, 1996, order, the Board held that the Area Director's

> October 25, 1995, decision was erroneous and should be summarily reversed. 25 CFR 2.8 is, and was intended to be, a self-contained regulation establishing procedures for appealing from the unique situation in which a BIA official fails to render a decision or to take action in a matter brought to his/her attention. The section provides that if a BIA official sets, and then fails to meet, a date for issuing a decision, an appeal may be taken as of the date set. However, it does not contain any time limits for filing an appeal, and nothing in it shows an intention to incorporate the appeal time limits in 25 CFR 2.9.
>
> Furthermore, in contrast to prior regulations, which required the person filing an appeal to be aware of the regulatory time limit for appealing, 25 CFR 2.7(b) now provides that parties are not bound by the filing deadline in 25 CFR 2.9 unless the BIA official provides specific notice of the deadline. It would be the height of inconsistency for 25 CFR 2.7(b) to toll the time limit for filing a notice of appeal when a written decision does not inform the parties of the time limit, but for that time limit to be strictly enforced when an appeal is brought under 25 CFR 2.8, a situation in which no decision has been issued and the parties have not been informed of any time limit for filing an appeal.
>
> The Board holds that the regulations do not establish a time limit for filing an appeal under 25 CFR 2.8 when a BIA official neither renders a decision nor establishes a time by which he/she will render a decision. Therefore, the Area Director's October 25, 1995, decision is reversed.

(Order at 2). The Board further stated that "[o]n the basis of the information before [it], it appears that a timely notice of appeal is pending with the Area Director. The Area Director is hereby given an opportunity to show cause why this matter should not be remanded to him for a decision on the merits * * * [or to] issue a decision in that appeal" (Order at 3).

Instead, the Area Director moved to dismiss this appeal on the grounds that it sought money damages against BIA either for breach of contract or tort. Noting that appellant sought "monetary compensation so as to access substitute quarters, or physical replacement" of the building (quoting from Appellant's Statement of Reasons at 4-5), the Area Director contended that the Board lacked jurisdiction to grant the relief requested regardless of the legal theory under which appellant might be proceeding. In support of

this argument, the Area Director cited several Board cases holding that the Board lacks jurisdiction to award money damages against BIA, and 211 Departmental Manual (DM) 13, the delegation of authority to the Office of Hearings and Appeals, as proof that authority over tort claims was not delegated to that Office or the Board. 3/

In its response to the motion to dismiss, appellant contends that the Area Director has mischaracterized its claim:

> The Appellant has sought compliance with the 1987 Stipulation Agreement between itself and the BIA: specifically, it has requested that the BIA replace the Toyon Wintu Center Administration building or, alternatively provide the Appellant with a suitable substitute, consistent with the Agreement.
>
> Appellant's claim is equitable in nature, i.e., for specific performance or restitution. It does not seek either tort or contract damages.
>
> Instead, the Appellant's appeal is properly before this Board asking it to review the refusal of the Area Director to honor the Settlement Agreement. As such it is an appeal pertaining to administrative action under 43 CFR 4.1.

(Appellant's Response at 2-3).

The Board thoroughly understands the problems both the Area Director and the Solicitor's Office had in attempting to determine appellant's legal theory. It is next to impossible to tell from appellant's various filings prior to coming to the Board whether it was proceeding under a theory of tort or breach of contract. It appears from the materials before the Board that specific performance and restitution were mentioned for the first time in appellant's filings with the Board.

However, much more fundamentally, the Board does not understand why, if appellant believed the Department had not lived up to its responsibilities under the settlement agreement, appellant did not simply return to the court which entered judgment on the agreement and ask for enforcement of it. 4/

3/ The Area Director could also have cited 209 DM 3.2(A)(1), which specifically delegates to the Solicitor that authority "[c]onferred by the provisions of 28 U.S.C. 2672, with respect to tort claims."

4/ In his motion to dismiss, the Area Director noted that, despite the fact that the settlement agreement required appellant and certain named individuals to vacate the premises, the United States was required to file suit in district court for forcible entry and unlawful detainer in order to have the occupants removed. The Area Director indicates that the matter ultimately went before the circuit court.

This course of action demonstrates the usual procedure for enforcing a judgment or resolving disputes as to the interpretation of a judgment, i.e., the matter is taken back to the court which entered the judgment in

Nonetheless, the Board has considered whether it might have jurisdiction in this matter depending upon how appellant's claim is characterized. If appellant has presented a tort claim, the Board clearly lacks jurisdiction because tort claims against the Government must be filed under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1994). Gosuk v. Juneau Area Director, 25 IBIA 62 (1993).

As the Area Director points out, the Board has held on several occasions that it lacks authority to award money damages against BIA. See, e.g., Welk Park North v. Acting Sacramento Area Director, 29 IBIA 213, 219 (1996); U.S. Fish Corp. v. Eastern Area Director, 20 IBIA 93 (1991). Thus, no matter whether appellant's theory is one of tort or breach of contract, the Board lacks jurisdiction if appellant seeks money damages.

Appellant now states, however, that it does not seek tort or contract damages but, instead, seeks specific performance or restitution. The Board has held that it lacks authority to order restitution. Dawn Mining Co. v. Portland Area Director, 20 IBIA 50 (1991). While the Board has never held that it lacks authority to order specific performance, and undoubtedly has such authority at least under some circumstances, it finds that, under the circumstances of this case, the effect of an order of specific performance would be indistinguishable from an order for money damages or restitution. The Board therefore finds that it lacks authority to order specific performance in this case.

Because of this conclusion, the Board does not decide what legal theory appellant is actually presenting; or whether, as the Area Director argues, the statute of limitations has run in regard to the underlying claim. 5/

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed because the Board lacks authority to grant the relief requested.

//original signed	//original signed
Kathryn A. Lynn	Anita Vogt
Chief Administrative Judge	Administrative Judge

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fn. 4 (continued)
the first instance. Normally, a judgment from a Federal court is not enforced through the filing of an administrative action within the agency alleged to have violated the judgment.

5/ In footnote 1 of its response to the Area Director's motion to dismiss, appellant complains that no Departmental official "previously told the Appellant * * * that the [BIA] was not the proper agency or forum to resolve their claim. Instead, it has essentially argued that the Appellant's claims have not been timely filed."

Although it finds this statement slightly simplistic in light of the Departmental responses before it, the Board is not aware of any statute or regulation that, under the circumstances of this case, would require a Government official to volunteer information to a party concerning how to proceed in filing a claim against the Government. The Board notes that appellant has been represented by counsel throughout this proceeding.